STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
OFFICE OF OPEN RECORDS COUNSEL
James K. Polk State Office Building
505 Deaderick Street, Suite 1600
Nashville, Tennessee 37243-1402

Justin P. Wilson
Comptroller

July 13, 2009

Bill Shory
News Director-WBIR-TV 10
1513 Hutchinson Avenue
Knoxville, Tennessee 37917

Mr. Shory:

You have requested an opinion from this Office that addresses the following:

Is the letter sent from the Knox County District Attorney General's office to the Knox County Law Director's office on July 7, 2009, required to be made available for public access pursuant to the Tennessee Public Records Act (hereinafter "TPRA")?

The facts as presented to this Office are as follows:

On July 7, 2009, a letter was sent from the Knox County District Attorney General's office to the Knox County Law Director's office. On July 8, 2009, a copy of that letter was requested by Yvette Martinez, a reporter for WBIR-TV, pursuant to the TPRA. After reviewing the request and speaking with an employee within the Knox County District Attorney General's office, the Knox County Law Director sent Ms. Martinez a letter stating that her request was denied based upon the fact that the letter is exempt from public access based upon Tenn. R. Crim. P. 16(a)(2) and attorney work product.

It is first important to point out that the exact content of the letter in question is unknown. As such, this Office can only advise you generally as to what the law may or may not require.

Tenn. R. Crim. P. 16(a)(2) reads as follows:

> Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

Courts in Tennessee have consistently held that records that are relevant to a pending or contemplated criminal action are exempt from public inspection and/or copying in pursuant to Tenn. R. Crim. P. 16(a)(2). *See Appman v. Worthington*, 746 S.W. 2d 165 (Tenn. 1987) and *Schneider v. City of Jackson*, 226 S.W. 3d 332 (Tenn. 2007). The Tennessee Attorney General's Office has opined as follows with regard to whether or not that protection flows with the record when it is sent from one governmental entity to another:

> Items exempt from disclosure under Tenn. R. Crim. P. 16(a)(2) remain exempt upon distribution to another governmental agency only if the items are transmitted for purposes in furtherance of a criminal prosecution.

Tenn. Op. Atty. No. 85-099 (April 2, 1985). Therefore, if the letter that was sent from the District Attorney General's office to the Knox County Law Director's office was "transmitted for purposes in furtherance of a criminal prosecution," then the letter is not required to be made available for public inspection and/or copying. However, if the letter was sent for any other purpose, then Tenn. R. Crim. P. 16(a)(2) does not exempt the letter from public inspection and/or copying pursuant to the TPRA.

With regard to the assertion that the letter is exempt because it is attorney work product, depending on the content of the letter, it may and may not be protected by attorney work product. As previously discussed in an opinion released by this Office on November 13, 2008, the Tennessee Court of Appeals has said the following with regard to the interplay between attorney work product and the TPRA:

> In order to qualify as work product, the party seeking protection must establish the following three elements: (1) that the material sought is tangible, (2) that the documents were prepared in anticipation of litigation or trial, and (3) that the documents were prepared by or for legal counsel.
>
> Any document that meets the definition of work product under Rule 26.02(3) of the Rules of Civil Procedure is exempt from the Act.

The Tennessean v. Tennessee Dept. of Personnel 2007 WL1241337 at *10 (Tenn. Ct. App. April 27, 2007).

Justice Koch, in delivering the opinion for the Tennessee Court of Appeals in *Swift v. Campbell* said the following about the work product doctrine:

> …the doctrine protects parties from "learning of the adversary's mental impressions, conclusions, and legal theories of the case," *Memphis Publ'g Co. v. City of Memphis,* 871 S.W.2d at 689, and prevents a litigant "from taking a free ride on the research and thinking of his opponent's lawyer." *United States v. Frederick,* 182 F.3d 496, 500 (7th Cir.1999).

Swift. v. Campbell, 159 S.W. 3d 565, 572 (Tenn. Ct. App. 2004).

As with the attorney-client privilege, the work product protection can also be waived.
In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, in the mid 90's the Department of Justice (hereinafter "DoJ") began investigating Columbia/HCA for possible Medicad and Medicare fraud. *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F. 3d 289, 291 (6th Cir. 2002). As a result of the investigation and in anticipation of litigation, several internal audits were conducted by Columbia/HCA not only of its own Medicare billing practices, but also of the Medicare billing practices of its subsidiaries. *Id*. at 291-92. During the course of the investigation, the DoJ made a request for the audits.

Id. at 292. Columbia/HCA denied the request asserting that the audits were protected by the attorney-client privilege and the work product doctrine. *Id.*

However, after a change in corporate control and in an effort to negotiate a settlement, Columbia/HCA agreed to produce some of the Medicare audits to the DoJ under a strict confidentiality agreement. *Id*. Subsequently, Columbia/HCA settled with the DoJ, and as a result several private payors made requests for copies of the internal audits. *Id*. In response, Columbia/HCA denied the requests again asserting that they were protected by the attorney-client privilege and the work product doctrine. *Id*.

In its analysis, the court looked at several cases from other jurisdictions where the concept of selective waiver, or the ability to disclose otherwise protected information in certain situations yet still maintain the right to assert the confidentiality of the previously disclosed information in other situations, had been either rejected or adopted. *Id*. at 305-307. In its conclusion, the court rejected the concept of selective waiver and found that even though Columbia/HCA had produced the audits to the DoJ after the parties entered into a confidentiality agreement, the production of the audits directly conflicted with the purpose of the work product protection. *Id*. at 306. According to the court, the decision to "show your hand" to an adversary is a "quintessential litigation strategy," and once that is done, the work product protection is waived. *Id*. at 307.

Additionally, in *Arnold v. City of Chattanooga*, the Tennessee Court of Appeals said that "[c]ourts have universally held that a party is prevented from invoking the work product doctrine immunity as both 'sword and shield'." *Arnold v. City of Chattanooga*, 19 S.W. 3d 779, 787 (Tenn. Ct. App. 1999). In *Arnold*, the Mayor of the City of Chattanooga (hereinafter "City"), after meeting with officials from the City's privately owned water company, decided that the water company needed to be municipally owned. *Id*. at 781. In order to determine the feasibility of such an undertaking, special counsel to the City retained a private firm to conduct an analysis on the issue and provide reports based upon the firm's findings. *Id*. Additionally, a firm that was already under contract with the City to provide financial services conducted a similar analysis and produced a report based upon that analysis. *Id*. Thereafter, the Mayor and the senior partner of the private firm that was retained made a presentation to a committee of the City Council and a follow-up presentation to the public regarding the feasibility of the acquisition of the private water company. *Id*. at 781-82 and 787-88. During both of the presentations, references were made to the studies that were conducted, as well as the reports produced, the sources of studies and the reports, and to a certain extent, the content of the reports. *Id*. Requests for copies of the reports were then made by two separate requestors. *Id*. at 783.

The City denied the requests based upon the fact the reports constituted attorney work product. *Id*. In its analysis, the court found that the reports were work product; however, because the Mayor and the senior manager of the firm that was retained revealed both the existence of the reports and referenced the content of the reports during the presentation that they made, the City waived its right to claim the work product protection. *Id*. at 788. The court concludes its analysis of this issue by saying, "[t]he City has used these reports as a sword in aid of acquiring the water company, and the authorities hold, a party may not use a work product to publicly further its cause offensively as a sword, and then assert the benefit of privilege as a shield." *Id*.

The same analyses that are set out in the cases above are relevant to the situation that you have presented. First, assuming that the all or even a portion of the letter is protected from public inspection and/or copying due to the work product exception, the issue becomes whether or not the work product protection has been

waived. Since the purpose of the work product doctrine is to prevent a party from "learning of the adversary's mental impressions, conclusions, and legal theories of the case," if the letter was sent to the Knox County Law Director's office because the two entities are working in conjunction with one another on an issue where litigation is anticipated, then waiver of the work product protection has not likely occurred. However, if the two entities are in an adversarial situation, it is likely that a court would find based upon the analyses of the courts in the above-cited cases, that the work product protection has been waived.

Again, because the exact content of the letter in question is unknown, as well as the relationship that exists between the Knox County District Attorney's office and the Knox County Law Director's office in this specific situation, this Office cannot say with certainty whether either of the legal bases relied upon by the Knox County Law director in his letter to Ms. Martinez prevent the public from accessing the letter.

Please feel free to call either myself or Ann Butterworth at (615) 401-7891 if you have any further questions.

Elisha D. Hodge
Open Records Specialist